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No. 99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE, THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ADVISORY COUNCIL ON UNDERWATER ARCHAEOLOGY, COUNCIL OF AMERICAN MARITIME MUSEUMS, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NORTH AMERICAN SOCIETY FOR OCEANIC HISTORY, SOCIETY FOR AMERICAN ARCHAEOLOGY, AND SOCIETY FOR HISTORICAL ARCHAEOLOGY, IN SUPPORT OF THE PETITIONER

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July 5, 2000

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, *ET AL.*, IN SUPPORT OF THE PETITION

The National Trust for Historic Preservation in the United States, Advisory Council on Underwater Archaeology, Council of American Maritime Museums, National Conference of State Historic Preservation Officers, North American Society for Oceanic History, Society for American Archaeology, and Society for Historical Archaeology respectfully petition this Court pursuant to Rule 37.2(b) for leave to file an *amicus curiae* brief, filed simultaneously herewith, in support of the above-captioned

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.[1]

Columbus-America Discovery Group, Inc., has consented to the filing of this brief, as evidenced by the letter filed with the Clerk of this Court. However, Respondent Atlantic Mutual Insurance Co., *et al*, has withheld its consent.

The National Trust for Historic Preservation was chartered by Congress in 1949 as a private, nonprofit corporation to further the historic preservation policies of the United States and to facilitate public participation in historic preservation. 16 U.S.C. § 468. Congress intended the National Trust to mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources. S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. It is in the spirit of this charter that the National Trust seeks to express its views in this case, together with the co-*amici* organizations.

The National Trust has approximately 250,000 individual members and nearly 3,500 member organizations involved in local historic preservation activities nationwide. These members have a substantial interest in upholding and enhancing the effectiveness of federal and state historic preservation laws. The National Trust also provides extensive advisory and technical services to state and local governments that have enacted archeological and historic preservation laws.

The National Trust frequently participates both as *amicus curiae* and as a plaintiff in cases involving the enforcement, interpretation and constitutionality of historic preservation laws. In addition, the National Trust testified before Congress in support of the Abandoned Shipwreck

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[1] The interests of the *amici* organizations are described more fully in the Appendix to the Brief.

Act, and has published legal articles on the protection of historic shipwrecks.[2]

The *amici* organizations particularly wish to express their views as friends of the Court because of the national importance of the issue in this case, which the *amici* have followed closely. This case provides the Court with an opportunity to resolve the conflict among the lower federal courts concerning the standard for determining whether a shipwreck has been abandoned under admiralty law and the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106. *Amici* believe that the decision in this case negatively impacts the regulatory authority of state governments to protect their underwater historic resources.

The National Trust and many co-*amici* have previously participated as *amici* in cases involving historic shipwrecks both before this Court, in lower federal courts and state courts.[3] The National Trust and co-*amici* have monitored litigation concerning historic shipwrecks both before and after the passage of the ASA and have a unique national perspective on the effect of such litigation throughout the

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[2] *See, e.g.*, Thompson M. Mayes, *Current Legal Issues in the Law of Historic Shipwrecks*, 5 Preservation L. Rep. 2027 (1986); Robert Moyer, *The Law of Shipwrecks: Conflict and Controversy*, 2 Preservation L. Rep. 2072 (1983).

[3] *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 746 F. Supp. 1334 (N.D. Ill. 1990) (separated in subsequent proceedings), *rev'd, Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 513 U.S. 961 (1994); *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992); *Illinois ex rel. Illinois Historic Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999).

country. Thus, the National Trust and co-*amici* have a substantial interest in strengthening the interpretation of federal and state historic preservation laws, including the ASA.

For the reasons stated above, *amici curiae* respectfully request that this Court grant their motion to file the attached brief in support of the petition for a writ of certiorari filed by Columbus-America Discovery Group, Inc.

Respectfully submitted,

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QUESTION PRESENTED

Should the Court resolve the existing conflict among the U.S. Courts of Appeals for the First, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits regarding the standard for abandonment under admiralty law, which the Court has previously held governs the definition of abandonment under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101?

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INTERESTS OF THE AMICI CURIAE

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private nonprofit corporation to facilitate public participation in historic preservation and to further the historic preservation policies of the United States. 16 U.S.C. § 468. Additional information describing the National Trust for Historic Preservation, Advisory Council on Underwater Archaeology, Council of American Maritime Museums, National Conference of State Historic Preservation Officers, North American Society for Oceanic History, Society for American Archaeology, and Society for Historical Archaeology is included in the Appendix.[1]

The National Trust and co-*amici* have a strong interest in the preservation of shipwreck sites for their historical, archaeological, scientific, and cultural value. The National Trust, co-*amici*, and other national preservation and archaeological groups strongly advocated for the passage of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (hereinafter "ASA" or the "Act")[2] to clarify states' authority to protect historic shipwrecks. The National Trust

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The National Trust advocated passage of the ASA, and testified before Congress on several occasions in support of the legislation. *See Abandoned Shipwreck Act of 1987: Hearing on H.R. 74 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine & Fisheries*, 100th Cong., 1st Sess. (1987) (testimony of J.J. Walter, President, National Trust); *Abandoned Shipwreck Act of 1987: Hearings on S. 858 Before the Subcomm. on Public Lands, Nat'l Parks & Forests of the Senate Comm. on Energy & Natural Resources*, 100th Cong., 1st Sess. (1987) (testimony of J. Revell Carr, Trustee, National Trust).

and other co-*amici* seek to ensure that these fragile and irreplaceable resources are appropriately preserved and protected as cultural and archaeological sites, rather than as commercially exploitable property. Although the ASA does not apply to the *S.S. Central America*, the shipwreck at issue here, this case provides the Court with the opportunity to resolve conflicting interpretations among the lower federal courts of whether a shipwreck has been "abandoned" under admiralty law and the ASA. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998).

REASONS FOR GRANTING THE WRIT

Amici curiae believe this Court's review is necessary to resolve conflicting definitions of abandonment in the circuit courts and differing applications of the standard to be applied in determining title to abandoned shipwrecks. In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), this Court stated that the definition of "abandoned" under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. § 2105, "conforms with its meaning under admiralty law." 523 U.S. at 508. However, the federal and state courts applying the term under traditional admiralty law, which governs the ownership of abandoned shipwrecks outside the states' jurisdiction—and under the ASA, which governs abandoned shipwrecks inside the states' territorial limit—have defined abandonment in a variety of inconsistent ways. Without clear guidance, the Fourth Circuit has adopted an extreme definition of abandonment that requires the most stringent burden of proof. The definition used by the Fourth Circuit is inconsistent with other circuits, inconsistent with admiralty precedent, and contributes to the ongoing judicial confusion about the treatment of shipwrecks throughout the United States. This confusion severely limits both the state and federal governments' ability to regulate these important resources as Congress intended.

THE COURT'S REVIEW IS NEEDED TO RESOLVE CONFLICTING STANDARDS FOR ABANDONMENT AND TO ESTABLISH A UNIFORM STANDARD FOR THE TREATMENT OF HISTORIC SHIPWRECKS

A. Abandonment Is Interpreted and Applied Inconsistently by Courts Around the Country

The meaning of the term "abandoned" is a fundamental issue, both in admiralty law and under the ASA. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). In admiralty law, whether a shipwreck is defined to be abandoned dictates whether the finder of the shipwreck receives title or whether title remains with the original owner or successor in interest. Under the ASA, the term "abandoned" dictates whether or not the ASA will apply at all. 43 U.S.C. § 2105.

Courts are interpreting "abandonment" in an inconsistent manner, adopting different standards and burdens of proof, and using similar evidence in seemingly similar cases to reach dramatically different results. Although the Fourth Circuit was not required to consider the ASA in its decision concerning the *S.S. Central America*, the court's interpretation of abandonment is significant as precedent in other cases where the ASA applies. This Court confirmed in *California v. Deep Sea Research* that "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." 523 U.S. at 508. Thus, the conflict among the courts over the standard for abandonment causes enormous confusion, not only under admiralty law, but also under the ASA.

Presently before this Court are two petitions seeking clarification of the standard for abandonment: the instant case, and *Yukon Recovery v. Ocean Mar*, 205 F.3d 1189 (9th Cir. 2000), *petition for cert. filed*, No. 99-1958 (concerning the *S.S. Islander*, which sank near Juneau in 1901 with a

large shipment of gold). *Amici* urge the Court to address this issue of abandonment raised by these conflicting cases.

B. The Inconsistent Interpretations of Abandonment Result in Confusion, Costly Litigation,and the Loss of Immensely Significant Archaeological Sites

The courts' inconsistent definitions of abandonment create a range of problems for the treatment and disposition of historic shipwrecks under the ASA and in admiralty law.[3] This confusion generates costly litigation and diverts government funds to time-consuming and uncertain defenses of their authority to regulate these sites. As a result, funds that could be used to preserve artifacts through underwater archaeological excavations are wasted instead on litigation, and the public is denied access to the historical information these shipwrecks contain. In addition, the current circuit conflict over the standard of abandonment promotes forum shopping in shipwreck disputes. Because venue is satisfied in any district where recovered artifacts are found or where the salvor has *in personam* jurisdiction, a salvor wishing to assert title to a shipwreck might be encouraged to shop for the forum that adheres to the abandonment standard most favorable to the particular facts of his case. *See* 28 U.S.C. § 1333; *Treasure Salvors v. The Unidentified Wrecked &*

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[3] While the Court of Appeals' decision on what constitutes abandonment will place an undue burden on the states' efforts to preserve historic shipwrecks, the US will also be adversely affected where such shipwrecks lie on public lands under its ownership or control. Under the ASA, title to abandoned shipwrecks on federal public lands stays within the United States' jurisdiction. 43 U.S.C. § 2105(d). The United States has the responsibility of protecting and managing the land, marine life and historic artifacts of its national parks, national seashores and national marine sanctuaries, including abandoned shipwrecks embedded in those submerged lands. *See Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla.1993).

Abandoned Vessel, 640 F.2d 560, 567-68 (5th Cir. 1981).

This Court's review is needed to resolve the conflicting interpretations of abandonment, because the resulting confusion significantly undermines the ability of the states to regulate resources entrusted to them by Congress in the ASA. These judicial conflicts only exacerbate the confusion and inconsistencies in the treatment of shipwrecks themselves, which have been the subject of increasing controversy ever since the technologies were developed to locate and excavate these resources.

C. Abandonment Is Key to the States' Protection of Historic Shipwrecks As Archaeological Sites for the Public

Technological advances in the late twentieth century—such as improvements in SCUBA technology and the development of sidescan sonar and remote-controlled submersible vessels—led to the discovery of historic shipwrecks on a much greater scale than ever before envisioned. Archaeologists and historians began to excavate shipwreck sites in accordance with scientific standards, uncovering the vast information these sites contain about maritime history and culture and making this information available for public interpretation. Simultaneously, treasure salvors began to realize the possibility of reaping pecuniary gain from the sometimes immense monetary value of the artifacts located in shipwreck sites.

Historic shipwrecks are veritable time capsules of our heritage. Because they lie undisturbed until discovery, every historic shipwreck provides an important glimpse of the past—a tableau that tells us about a ship, its cargo, and the lives of its crew and passengers. The study of these sites provides valuable information about maritime history and technology, international and regional trade and culture, and the seafaring life.

Without proper regulation, the commercial salvage of historic shipwrecks can easily result in the loss or destruction of priceless legacies. Where recovery techniques fail to preserve and document information from the shipwreck, archaeologists lose crucial pieces of the complex puzzle that tells the story of a vessel and its times. If proper conservation techniques are not applied to the vessel and its contents, the rapid deterioration of ancient materials exposed to surface conditions makes it impossible for archaeologists to glean accurate scientific and historical information from the remains. Once lost, these resources can never be recovered or replaced.

As access to historic shipwrecks increased, the states recognized the immense significance of these sites and began to regulate shipwrecks in their territorial waters in order to protect the shipwrecks' integrity as archaeological resources, just as they regulated cultural resources on state lands.[4] Most states have antiquities or archaeology statutes that specifically regulate historic shipwrecks as underwater archaeological sites. These statutes usually allow the state historical agencies to regulate excavation of the wrecks, either through a permitting process or a contracting arrangement. Typically, a state would grant a permit or enter into a contract with the private salvor that discovered the shipwreck, requiring the site to be excavated in a manner that preserves the archaeological information it contains so that the public can benefit from the historical interpretation made possible by the site.

State regulation of historic shipwrecks was challenged

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[4] To date, all 50 states have enacted laws to encourage or require preservation of areas with historic or cultural significance and at least 28 states have specific laws relating to the treatment of underwater archaeological resources. *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988); *see also* CONSTANCE BEAUMONT, SMART STATES, BETTER COMMUNITIES 24 (1996).

by commercial salvors, who often preferred to avoid the expense and delay of treating shipwrecks as archaeological resources. Salvors began to challenge these regulations under admiralty law, because in admiralty the courts were more likely to award the salvors possession of or title to the historic shipwrecks, without restricting the sale or salvage of the artifacts.[5]

D. "Abandonment" Is a Critical Term Under Admiralty Law

There are two theories in admiralty law under which a salvor could obtain rights to a shipwreck and recover artifacts from the site: the law of salvage and the law of finds. A salvor seeking control of a shipwreck would usually bring claims under both salvage and finds, requesting that the courts award either exclusive possession under salvage law or, in the alternative, actual title under the law of finds. *See, e.g., Cobb Coin Co., Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel,* 549 F. Supp. 540, 556 (S.D. Fla. 1982). The definition of abandonment is critical to the

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[5] Prior to the ASA, the principal problem with state assertion of jurisdiction over shipwrecks was that there was no express grant of title to shipwrecks within the three-mile limit under the Submerged Lands Act. 43 U.S.C. §§ 1301-1315. This weakness was exploited by treasure salvors who brought a series of challenges in federal court against the states' rights to control and manage historic shipwrecks. *See, e.g., Cobb Coin Co., Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981) and 549 F. Supp. 540 (S.D. Fla. 1982) (Florida state lands); *Chance v. Certain Artifacts Found & Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (Georgia state lands); *Maritime Underwater Surveys v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983) (Massachusetts state lands); *Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983), *aff'd*, 758 F.2d 1511 (11th Cir. 1985) (Biscayne National Park); *People v. Massey*, 358 N.W.2d 615 (Mich. App. 1984) (Michigan state lands).

distinction between these two legal theories. The law of salvage is predicated on the assumption that an owner exists and has not abandoned the vessel.[6] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-7, at 512 (1987). The law of finds, on the other hand, is based on the idea that the property has been abandoned and the finder of the abandoned property is entitled to ownership. *See, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1513-14 (11th Cir. 1985). Whether or not a shipwreck was "abandoned" would determine whether the salvor received actual title to the shipwreck under the law of finds or simply a salvage award, which was enforced as a lien against the ship.

After 1960, modern technology began to open up much greater access to ancient or long-lost shipwrecks, and the law of finds was increasingly used as an adjunct to salvage claims. *See Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065; *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452 (E.D. Va. 1960); David R. Owen, *The Abandoned Shipwreck Act of 1987: Goodbye to Salvage in the Territorial Seas,* 19 J. Mar. L. & Com. 499, 510 (1988). Borrowed from the common law "finders-keepers" principle, the law of finds allowed the salvor to obtain title to an abandoned shipwreck rather than simply a salvage award, and avoided the fiction that an owner of a long-lost wreck was still in existence. However, if property was found embedded in the soil of land owned by another, an exception to the law of finds would apply, providing that the property

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[6] The law of salvage developed to encourage salvors to take the sometimes precarious steps necessary to rescue ships in marine peril. Salvage law would guarantee a reward for saving valuable property and returning those items to the stream of commerce. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-7, at 512 (1987).

belonged to the landowner. *Klein,* 758 F.2d at 1519.

Nonetheless, admiralty courts, accustomed to adjudicating disputes in commercial settings, have struggled when called upon to determine the appropriate law to apply to long-lost historic vessels. One early key issue was whether the sovereign–either the state or the United States–held title to abandoned shipwrecks simply by virtue of its sovereignty, under the accepted admiralty principle of sovereign prerogative. *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 340-42 (5th Cir. 1978). Ultimately, it was determined that the U.S. government had the authority to assert ownership of abandoned shipwrecks but had not done so. *Id.* at 341-42.

The case that threw the entire area into confusion was the *Cobb Coin* decision, which held that state regulation of historic shipwrecks conflicted with and was preempted by admiralty law. *Cobb Coin,* 549 F. Supp. 540 (S.D. Fla. 1982). As a result of that decision, the entire state regulatory framework was cast into doubt, and states were subjected to an increased threat of litigation whenever they attempted to regulate historic shipwrecks. *See Jupiter Wreck, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985); *Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked & Abandoned Vessel, Etc.*, 577 F. Supp. 597, 608 (D. Md. 1983); *Cobb Coin*, 549 F. Supp. 540 (S.D. Fla. 1982); *Cobb Coin*, 525 F. Supp. 186 (S.D. Fla. 1981).

E. Congress Intended to Resolve the Inconsistent Treatment of Historic Shipwrecks When it Passed the Abandoned Shipwreck Act of 1987, Relying on the Traditional Admiralty Definition of Abandonment

In response to the increasing conflicts over the potential uses of historic shipwrecks, along with increasing confusion

concerning the appropriate judicial forum and legal principles for resolving these conflicts, Congress enacted the Abandoned Shipwreck Act of 1987.[7] Recognizing the significance of historic shipwreck sites, the Congress stated:

> As new technologies have allowed the recovery of wrecks that have been lost for long periods of time, a new concern has been developed for the historic and recreational interests in shipwrecks. Shipwrecks are no longer viewed as only lost commercial resources that should be salvaged so that the goods can be returned to commerce. Rather, many shipwrecks are . . . viewed as invaluable and irreplaceable archeological resources.

S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 365. Congress determined that historic abandoned shipwrecks were most appropriately owned and managed by the states, which have expertise and established programs for the management of cultural resources.[8] Congress' intent was to clarify the states' authority to exercise stewardship over these resources so states would no longer be forced to squander their time and money defending their title to historic shipwrecks in federal admiralty courts. *See id.*; 134 Cong. Rec. H1178, 1183 (1988).[9]

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[7] Congress stated that litigation "led to the confusion over the ownership of, and responsibility for, historic shipwrecks in State waters. This confusion led to the [ASA] . . . ." H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988).

[8] *See supra* note 4.

[9] "The States spend a disproportionate amount of effort and expense in admiralty court arguing for jurisdiction over the shipwrecks on their State-submerged lands. Admiralty law developed in the ancient Mediterranean . . . . It was designed to encourage the retrieval of commercial goods, not the protection of cultural resources." 134 Cong.

Although the ASA was passed with the express intention of resolving the legal confusion surrounding the treatment of historic shipwrecks, the confusion and inconsistent treatment by the courts have not only continued, but actually increased since the passage of the ASA. Courts have been called upon to resolve litigation over the constitutionality of the ASA,[10] the application of the Eleventh Amendment,[11] and now, increasingly, the issue of abandonment.

F. The ASA Only Applies to Abandoned Shipwrecks

Under the ASA, the federal government asserted title to certain historic shipwrecks and transferred that title to the

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Rec. H1178 (1988).

[10] *See Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1991), *rev'd*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992); Zych *v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 746 F. Supp. 1334 (N.D. Ill. 1990), *rev'd sub nom. Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 513 U.S. 961 (1994).

[11] Some states sought to avoid the jurisdiction of federal admiralty courts by asserting that state claims of title to shipwrecks could not be heard in federal courts because of the Eleventh Amendment. *See Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part, rev'd in part*, 458 U.S. 670 (1982); *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); *Riebe v. The Unidentified, Wrecked & Abandoned 18th Century Shipwreck*, 691 F. Supp. 923 (E.D.N.C. 1987). However, this Court held in *California v. Deep Sea Research*, that the Eleventh Amendment does not bar a federal court's jurisdiction over an *in rem* admiralty action where the state does not have possession of the vessel. 523 U.S. at 508.

states on whose submerged lands the shipwrecks are located. 43 U.S.C. § 2105. Congress chose to define the vessels covered under the Act by using characteristics common to historic shipwrecks. For example, Congress structured the ASA to apply only to "abandoned" shipwrecks, intending that more modern shipwrecks would not be included within the scope of the Act. In addition to being abandoned, all shipwrecks covered by the Act must fall into a specific category indicating that they are likely to be historic. For instance, older shipwrecks would have a higher tendency to become *embedded* over time, either in the seabed or in coralline formations. Congress also included shipwrecks *lying on* submerged lands that were eligible for inclusion in the National Register of Historic Places, in order to include shipwrecks that were located on rocks, or were not embedded for some other reason, but were nevertheless historic. *Id.* § 2105(a).

Thus, a sunken vessel is covered by the ASA if it is (1) abandoned; (2) located in or on a state's submerged lands; and (3) either embedded in the sea floor or determined eligible for listing in the National Register of Historic Places. *Id.* Once the vessel is determined to be abandoned under the ASA, the states then have authority to regulate the site by requiring salvors to excavate in accordance with professional archaeological standards. *See Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 682 (E.D. Va. 1999).

G. Congress Intended to Define Abandonment Under the Traditional Admiralty Standard

Traditional admiralty law allows abandonment to be inferred by circumstantial evidence. *Chance v. Certain Artifacts Found & Salvaged from The Nashville, A/K/A, The Rattlesnake*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985). Legislative reports

highlight Congress' understanding of "abandonment" under admiralty law at the time the ASA was enacted:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, at 2 (1988). Similarly, the House Merchant Marine and Fisheries Committee Report notes:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights . . . . The act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514, *supra*, pt. 2, at 5 (1988).

The meaning of the term "abandoned" was further clarified in guidelines issued by the National Park Service pursuant to Section 5 of the Act, 43 U.S.C. § 2104. The Guidelines state:

> *Abandoned* shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. *By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to*

> *provide legal notice of abandonment* to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 408), *an owner shows intent to give up title.*

55 Fed. Reg. 50,120 (1990) (emphasis added).

The traditional admiralty standard used in determining abandonment is that it "may be accomplished by either an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." *Bunge Corp. v. Agri-Trans Corp.*, 542 F. Supp. 961, 969 (N.D. Miss. 1982) (citing 3A BENEDICT ON ADMIRALTY § 134 (7th ed. 1980)), *aff'd in part, vacated in part on other grounds*, 721 F.2d 1005 (5th Cir. 1983). In the absence of express statements or acts, abandonment is determined from all of the circumstances. *Chance*, 606 F. Supp. at 804. Most admiralty courts have held that abandonment may be inferred from the passage of time, absent affirmative acts showing non-abandonment.[12]

However, there is an exception to the traditional admiralty standard, which provides that when sovereign vessels are owned by the United States, the shipwreck cannot be abandoned other than through an express statement of intent by the sovereign to abandon the vessel. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 710 (1982). However, the express abandonment standard has traditionally been applied solely to sovereign vessels and not to privately owned vessels. It is therefore unclear why the Fourth Circuit applied this standard in the context of non-sovereign shipwrecks, such as the *S.S. Central America*.

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[12] This rule is sometimes referred to as the doctrine of *animus revertendi* (the owner has no intention of returning). *Chance*, 606 F. Supp. at 804.

H. Confusion Exists Among the Circuits Regarding the Appropriate Definition of Abandonment and the Applicable Burden of Proof Under the ASA and Traditional Admiralty Law

In recent years, both federal courts and state courts have been applying inconsistent standards for proving that shipwrecks have been considered abandoned. While some courts apply a rule that requires clear affirmative acts of abandonment such as express declarations, others simply require a passage of time. The lack of a clear standard to follow, along with inconsistent application of requirements to determine abandonment, is expressly acknowledged by the federal circuit courts. In fact, the Fourth Circuit in the case at bar struggled with the lack of a defined standard and invited this Court to resolve the issue:

> [W]e agree that the majority's abandonment test [in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)] was rejected by two other courts of appeal, the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Jonathan*, . . . and the Sixth Circuit in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence* . . . .
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> ****
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> A comparison of our earlier decision in this case with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question . . . .

Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 203 F.3d 291, 304 (4th Cir. 2000).

Comparing the standards established by the Sixth and Ninth Circuits, the Fourth Circuit has chosen to adopt the most stringent rule, requiring evidence of express abandonment if an alleged owner asserts title to the goods or the vessel. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461-62 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). Express abandonment is extremely difficult to establish as it fails to consider any other circumstances. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997) (*Fairport II*), *vacated*, 523 U.S. 1091 (1998), *on remand*, 177 F.3d 491, 499 (6th Cir. 1999) (*Fairport III*).

The express abandonment standard, as adopted by the Fourth Circuit, means that unless there is evidence of an expressly stated intent to abandon the shipwreck, no other party, including the state, may appear and claim title to the shipwreck, regardless of any other factors, such as the passage of time or the character of the vessel. *Columbus-America*, 974 F.2d at 461-62. Application of such a stringent rule ignores the diverse factual circumstances involved in abandoned shipwreck cases. Courts have considered many factors in determining abandonment, including the lapse of time, prior salvage efforts, availability of technology, retention of records of ownership, and efforts to prevent unauthorized salvage efforts. *See, e.g., Yukon Recovery*, 205 F.3d 1189 (9th Cir. 2000); *Deep Sea Research*, 102 F.3d 379 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds & remanded sub nom. California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Martha's Vineyard Scuba Headquarters*, 833 F.2d 1059 (1st Cir. 1987); *Moyer v. The Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993). Failing to consider

these important factors is inconsistent with the traditional standard of admiralty law.

By contrast, the First, Third, Fifth, Seventh, and Eleventh Circuits have generally applied the traditional interpretation under admiralty law, allowing for a presumption of abandonment based upon circumstantial evidence of intent, such as a lapse of time.[13] *See, e.g., Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Martha's Vineyard,* 833 F.2d at 1065 (abandonment is found when "articles have been presumptively abandoned, i.e., either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title"); *Klein,* 758 F.2d at 1514; *Treasure Salvors,* 569 F.2d at 337; *Sunken Treasure, Inc. v. The Unidentified, Wrecked & Abandoned Vessel,* 857 F. Supp. 1129 (D.V.I. 1994).

The Sixth and the Ninth Circuits have also discussed the divergence of authority among the circuits. *See, e.g., Fairport II,* 105 F.3d at 1084; *Deep Sea Research,* 102 F.3d at 387-88, *aff'd in part, vacated in part on other grounds,* 523 U.S. 491 (1998). Both courts summarily rejected the Fourth Circuit's standard as departing from traditional admiralty law. In fact, in *Fairport II,* the court stated that "[c]ommon sense makes it readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." 105 F.3d at 1085. Accordingly, these circuits allow states to prove by inference that a long-lost shipwreck is abandoned under the ASA and admiralty law. *See id.*; *Deep Sea Research,* 102 F.3d at 388. "Permitting proof of

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[13] Courts typically state that they are following the traditional admiralty definition of abandonment used before the ASA, which is what Congress intended. *See also Illinois ex rel. Illinois Historic Preservation Agency v. Zych,* 710 N.E.2d 820 (Ill. 1999).

abandonment by inference, of course, broadens the applicability of the statute and facilitates the achievement of Congress' goals." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, Known as the Captain Lawrence*, 177 F.3d 491, 508 (6th Cir. 1999) (*Fairport III*). However, in practice the Ninth and Sixth Circuits themselves have departed from the traditional standard in divergent ways.

Recently, on remand from this Court in *Fairport*, 523 U.S. 1091 (1998), the Sixth Circuit created even more confusion by applying the standard of clear and convincing evidence as the burden of proof for abandonment by inference. *Fairport III*, 177 F.3d at 508. The Fourth Circuit also requires a clear and convincing evidence standard. *See Columbus-America*, 974 F.2d at 461. The Ninth Circuit, by contrast, requires a preponderance of the evidence standard to show abandonment. *See Yukon Recovery,* 205 F.3d at 1193-94; *Deep Sea Research,* 102 F.3d at 387-88. Adding to the confusion is the Ninth Circuit's decision in *Yukon Recovery,* where the court was unsure whether the lack of technology should be considered one factor of many in proving abandonment, or whether it should operate as a complete bar to a finding of abandonment. *Id.* at 1189.

Applying a "clear and convincing" standard places a much greater burden on the states to prove that shipwrecks have been abandoned. The dissent in *Fairport III* explained:

> [A]lthough neither the statute nor its history addresses the standard of proof applicable to the abandonment showing, adopting a clear and convincing evidence standard over the more typical preponderance of the evidence standard would run counter to the expressed intention of Congress to place title to these abandoned shipwrecks in the hands of the states. Without clear direction to the contrary, I cannot endorse the adoption of the clear and convincing evidence standard.

177 F.3d at 502 (Moore, J., dissenting).

The Fourth Circuit's standard of abandonment will result in salvors and treasure hunters seeking out descendents of former owners, foreign governments, insurance companies or their successors who could arguably claim title to lost property, and attempting to obtain ownership rights in historic shipwrecks and their cargo. The effect will be to undermine state regulatory authority and uniformity in the treatment of historic shipwrecks throughout the nation.

CONCLUSION

The decision of the Fourth Circuit exacerbates the confusion and jurisdictional conflicts in the law governing historic shipwrecks, which Congress sought to correct in the ASA. This Court's review is necessary to resolve the conflict among the circuits and to enable the states to regulate abandoned shipwrecks as Congress intended. Thus, for the reasons discussed more fully above, *amici* respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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